STATE OF MICHIGAN

IN THE SUPREME COURT

SHARDA GARG,

Plaintiff-Appellee,

V

MACOMB COUNTY COMMUNITY MENTAL HEALTH ~~SERVICES, a governmental agency of MACOMB COUNTY~~,

Defendant-Appellant.

and LIFE CONSULTATION CENTER, Defendant.

Supreme Court No:

Court of Appeals No.: 223829

Macomb County Circuit Court No.: 95-3319 CK

APPLICATION FOR LEAVE TO APPEAL BY MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES

NOTICE OF FILING SUPREME COURT APPLICATION

NOTICE OF HEARING

EXHIBITS (Bound Separately)

AFFIDAVIT OF SERVICE

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STATEMENT IDENTIFYING THE JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant Macomb County Community Mental Health Services, a governmental agency of Macomb County, seeks peremptory reversal of, or leave to appeal from the March 29, 2002, decision of the Court of Appeals (Griffin, P.J., and Meter and Kelly, JJ.) (exhibit A), affirming the judgment for plaintiff Sharda Garg in the amount of $354,298.17 (exhibit B). That judgment was entered on August 17, 1998 by the Honorable George Montgomery on a jury verdict of $250,000, following a trial before the Honorable Roland Olzark in 1998 (Tr 4/1/98 through 4/23/98).

The jury found that defendant retaliated against plaintiff between 1983 and 1995 for engaging in activities protected by the Elliot Larsen Civil Rights Act--alleged opposition to sexual harassment in 1981, or a complaint of national origin discrimination made in 1987. This appeal presents a unique opportunity for this Court to provide clear guidance on a question not before addressed by the Court: what will, or will not, suffice to meet three of four elements of a retaliation claim--engagement in protected activity, knowledge of engagement in protected activity by the employer, and a causal connection between that activity and an adverse employment action. It also provides the Court with a opportunity to revisit the continuing violations doctrine of Sumner v The Goodyear Tire and Rubber Company, 427 Mich 505 (1986), and determine whether it should be expanded as it was by the lower courts here.

As to the first issue, this appeal results from what, defendant submits, was a fundamental abdication by the lower courts of their judicial responsibility to objectively evaluate the record to determine whether there was evidence sufficient to establish a prima facie case of retaliation for engaging in activity protected by the Elliot-Larsen Civil

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Rights Act. The trial court referenced not evidence but the arguments of counsel in concluding the evidence was sufficient. The Court of Appeals listed facts in evidence and then in conclusory fashion stated they were sufficient circumstantially to support both theories, when in they could only do so by pure speculation and conjecture.

No reasonable person could find that Sharda Garg's act of "opposition" in 1981--reflexively, silently striking an individual who innocently tapped her shoulder, whom she then discovered to be a supervisor, Mr. Habkirk--was opposition to sexual harassment, and thus activity protected by the Elliot Larsen Civil Rights Act. There was no testimony from anyone, including Sharda Garg herself, that this had been intended by plaintiff to be opposition to sexual harassment. Plaintiff never told Mr. Habkirk why she hit him, and never told anyone else about this incident, or that she had opposed sexual harassment. There was no evidence connecting the allegedly protected nature of plaintiff's conduct to the denial of job promotions two to 14 years later.

There also was insufficient evidence to support plaintiff's second theory of retaliation for filing a grievance in 1987 complaining of national origin discrimination by supervisor Kent Cathcart. There was no testimony by anyone that the denial of promotions, which did not occur until two years after that grievance, were "because" Sharda Garg had complained of discrimination. Plaintiff had been denied promotions 11 times before the grievance, and the next denial or adverse employment action did not occur until two years after the grievance. There was no basis in evidence or logical inference upon which to included the continued denial of promotion was because of one particular grievance.

A great injustice has been done to Macomb County Community Mental Health Services and those individuals implicated by the verdict as having acted unlawfully

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when in fact they did not do so, and the actual proofs confirmed they did not. This application presents to the Court an opportunity both to right what clearly is a wrong, and to set forth within a concrete context the nature of the proofs necessary to establish retaliation, the elements of which are far more exacting that those of a claim for discrimination.

This application also presents a significant legal issue not before considered by this Court--whether the discovery rule component of the continuing violations doctrine of Sumner v The Goodyear Tire and Rubber Company, 427 Mich 505 (1986), should be extended to apply to render timely claims based on concrete, discrete, and known retaliatory acts (the denial of promotions) occurring three to 12 years before suit was filed. Although the Sumner Court adopted the continuing violations doctrine from federal Title VII decisions, and although the Court of Appeals here conceded that federal law since interpreting the doctrine supports defendant's position here, the Court of Appeals declined to apply federal law because it is not "absolutely binding." (Slip opinion, p 4, n 9.) This too is a clear, if utterly illogical, injustice which, defendant respectfully submits, should be addressed, and corrected by this Court.

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER PLAINTIFF FAILED TO ESTABLISH A PRIMA FACIE CASE AS TO EITHER OF HER TWO THEORIES OF RETALIATION FOR ENGAGING IN ACTIVITY PROTECTED BY THE ELLIOT-LARSEN CIVIL RIGHTS ACT, REQUIRING A DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING THE VERDICT AS A MATTER OF LAW?

II

WHETHER, ALTERNATIVELY, A NEW TRIAL IS REQUIRED BECAUSE OF THE SUBMISSION TO THE JURY OF AT LEAST ONE THEORY OF RETALIATION LIABILITY WHICH WAS UNSUPPORTED BY THE PROOFS, AND AS TO WHICH A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED?

III

WHETHER, ALTERNATIVELY, THE CONTINUING VIOLATIONS DOCTRINE SHOULD NOT BE APPLIED TO AVOID THE PLAIN LANGUAGE OF THE STATUTE OF LIMITATIONS WITH RESPECT TO CLAIMS OF RETALIATION BASED ON THE SPECIFIC AND CONCRETE DENIAL OF 14 REQUESTS FOR PROMOTION MORE THAN THREE YEARS BEFORE THIS SUIT WAS FILED (FROM 1983 TO 1992)?

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STATUTES, COURT RULES AND OTHER AUTHORITIES

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CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant Macomb County Community Mental Health Services, a governmental agency of Macomb County, seeks leave to appeal from the March 29, 2002, decision of the Court of Appeals (Griffin, P.J., and Meter and Kelly, JJ.) (exhibit A), affirming the judgment for plaintiff Sharda Garg in the amount of $354,298.17 (exhibit B). That judgment was entered on August 17, 1998 by the Honorable George Montgomery on a jury verdict of $250,000 following a trial before the Honorable Roland Olzark in April of 1998 (Tr 4/1/98 through 4/23/98). The jury found that defendant retaliated against plaintiff from 1983 to 1995 for engaging in activities protected by the Elliot Larsen Civil Rights Act (opposition to sexual harassment in 1981 or complaining of national origin discrimination in 1987). Judge Olzark denied defendant's motion for judgment notwithstanding the verdict or a new trial by opinion and order issued November 3, 1999 (exhibit D).

Defendant in this appeal seeks to challenge the sufficiency of the proofs supporting plaintiff's retaliation claim. Defendant also seeks review of the lower courts' rejection of its motions, before and during trial, for partial dismissal of claims based on alleged acts of retaliation occurring between 3 and 12 years before this suit was filed.

Plaintiff Sharda Garg was at the time of trial still employed by defendant Macomb County Community Mental Health Services as a psychologist (classified as a "Therapist-II"). Plaintiff filed her complaint in this matter on July 21, 1995, alleging discrimination and retaliation in violation of the Elliot-Larsen Civil Rights Act. Plaintiff claimed that she had not been promoted to a variety of positions for which she had applied since 1983, because of discrimination against her due to her color and national origin (complaint, counts I and II), and because of retaliation against her as a result of a

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grievance in which she had complained about discrimination in 1985 (complaint, count III). Plaintiff was also permitted to amend her complaint to allege that she had been retaliated against because of her opposition in 1981 to sexual harassment of other employees by a supervisor (first amended complaint).

It was defendant's position, supported by the testimony of numerous witnesses at trial that Sharda Garg was simply a mediocre employee who lacked initiative and supervisory experience or skills, and who also lacked experience with patient populations treated in many of the positions for which she applied. While plaintiff had worked with developmentally disabled adults, she had little experience with children or the mentally ill. Plaintiff worked almost exclusively with developmentally disabled adults, and had (and had sought out) no supervisory responsibilities. These factors made plaintiff unqualified or less qualified than other applicants for many of the promotions or transfers for which she applied which involved different patient populations or a need for supervisory skills or experience. Additionally, plaintiff, as a union member, simply was ineligible for some of the positions for which she applied due to the requirements of the union contract (see Slaine, Tr 4/6/98, pp 401-417, Tr 4/7/98, pp 442-459, Demery, Tr 4/8/98, p 739, Griggs, Tr 4/13/98, pp 973-974, Cathcart, Tr 4/13/98, p 1069, Hoffman, Tr 4/13/98, pp 1136-1138, Gipprich, Tr 4/14/98, pp 1226-1227).

The jury found that plaintiff was not discriminated against based on her national origin or color. The jury did find, however, that plaintiff was retaliated against because she "opposed sexual harassment [in 1981] or because she filed a complaint or charge about being discriminated against [in 1987]" (verdict form, Exhibit C).

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Factual Background

By the time of trial, plaintiff claimed 18 separate acts of discrimination and retaliation; this consisted of not being awarded 18 promotions or transfers for which she applied over a 14-year period between 1983 and 1997. The vast majority of plaintiff's proofs were directed to her assertion of discrimination, found by the jury to be meritless. The proofs relevant to the retaliation claims were far more sparse.

Plaintiff, who is of Indian national origin, has worked as a psychologist at Macomb County Community Mental Health Services and has been a union member since 1978 (Tr 4/1/98, p 96). Until 1995, plaintiff worked in the Life Consultation Center ("LCC"). Those in the chain of command above plaintiff as her direct and indirect supervisors included at one time or another Donald Habkirk, Margaret Porkka, Joanna Bielenin, Terri Hibbard and Terry Falasa. Kent Cathcart was in plaintiff's chain of command from 1986 to 1995 (Tr 4/2/98, pp 56-61, 67).

In 1995, defendant Macomb County Community Mental Health Services was reorganized and divided into geographical areas (north, south, southwest) (Hoffman, Tr 4/13/98, pp 1155-116). Life Consultation Center ("LCC"), where plaintiff had worked under the supervision of Mr. Kent Cathcart since 1986, was dissolved in November 1995. At that time, Ms. Garg was moved to a facility called First North, with different supervisors, including Messrs. Miller and Hoffman (Griggs Tr 4/13/98, pp 979, 980, 1000, Cathcart, Tr 4/13/98, p 1062, Garg Tr 4/2/98, pp 61, 67-68, Tr 4/3/98, p 181, 186, 193).

Trial in this matter commenced on April 1, 1998. Plaintiff's direct examination testimony took nearly five days (Tr 4/1, 4/2, 4/3, 4/6, 4/7), followed by several hours of

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cross-examination on April 7, and on April 8, 1998 (pertinent excerpts of plaintiff's trial testimony are attached hereto and designated by transcript date).

Plaintiff then called Robert Slaine, a personal friend and supervisor, who testified that plaintiff was not qualified for the positions for which she applied and did not receive, or if she was qualified by experience, she was ineligible under the union contract (e.g., Slaine, Tr 4/6/98, pp 401, 415-417, Tr 4/7/98, pp 446-458). Plaintiff also called another supervisor, Margaret Demery, who explained why she had given a job to a coworker of plaintiff's, and who testified that she had no information that plaintiff had filed a union grievance (Tr 4/8/98, pp 738-739). Plaintiff also called Deborah Milhouse-Slaine, who testified she had not been sexually harassed (Tr 4/7/98, pp 510, 531-532).

Plaintiff also called Jan Hurst, a nurse, who claimed to have overheard Mr. Cathcart complain that a psychiatrist who was Indian could not speak very good English (Tr 4/9/98, pp 846-847), and Carmine Palmieri, a former coworker of plaintiff's who had been involved in some of the grievances filed by plaintiff. Mr. Palmieri described the grievance which included her complaint of discrimination (Tr 4/9/98, pp 841-870, 892-894).[1]

Plaintiff's Two Retaliation Theories

As reflected by the jury verdict form, plaintiff had two separate claims for retaliation. These claims were of retaliation for two separate actions by plaintiff, which

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[1] The transcript is referred to by the date of proceedings. Note that the transcripts for proceedings on April 8, 1998 and April 9, 1998 are transposed; the testimony, and defendant's motion for directed verdict in the volume labeled April 8, 1998 in fact occurred on Thursday, April 9, 1998; similarly, the proceedings labeled April 9, 1998, specifically the testimony of Jan Hurst and Carmine Palmieri, occurred on Wednesday, April 8, 1998.

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she claimed to be protected as opposition to violations of the Elliot-Larsen Civil Rights Act. Both instances of alleged protected activity occurred while plaintiff was at the Life Consultation Center, the first in 1981, and the second in 1987.

Plaintiff's first retaliation theory was that she had been retaliated against for 14 years as a result of opposing sexual harassment by a supervisor, Mr. Habkirk, in 1981. Plaintiff's theory in this regard was quite simply, bizarre. Plaintiff never testified at trial that she believed she herself was sexually harassed by Mr. Habkirk. Plaintiff's counsel repeatedly affirmatively represented throughout trial that plaintiff herself was never sexually harassed and, therefore, plaintiff was not opposing sexual harassment of herself (opening at Tr 4/1/98, pp 16-18, closing at Tr 4/22/98, pp 66, 68-69, 74, 113-114, Garg at Tr 4/15/98, pp 1344-1355). Plaintiff's counsel declared: "Let me be perfectly clear . . . . We are not saying that it was her belief that she was being sexually harassed . . .(argument on directed verdict motion at Tr 4/8/98, pp 807-810).

Rather, it was plaintiff's theory that Sharda Garg was retaliated for opposing sexual harassment by Mr. Habkirk of other employees which Ms. Garg had observed (see plaintiff's JNOV response brief, p 2). This alleged harassment, according to plaintiff's counsel, consisted of two instances of "unusual behavior" by Mr. Habkirk toward other employees at some unknown time in 1981--pulling one employee's bra strap, and snapping the elastic on the panties of another (Tr 4/1/98, p 123). Plaintiff could not recall, however, if these incidents occurred before or after the incident with Mr. Habkirk (Tr 4/1/98, pp 126-127).

Even more unusual was the means by which plaintiff purportedly opposed sexual harassment of her coworkers. This consisted of plaintiff striking a coworker in 1981 when the individual approached her from behind in a hall and simply tapped her on the

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shoulder. Plaintiff admitted she did not know who tapped her shoulder, or whom she struck until afterwards, as she acted purely reflexively when touched from behind. It was only after this admittedly reflexive act, that plaintiff discovered the hand was that of Mr. Habkirk (Garg, Tr 4/1/98, pp 122-132).

There was no evidence or claim that the shoulder tapping by Mr. Habkirk was inappropriate or sexual. Plaintiff never said a word to Mr. Habkirk to explain why she struck him, and never told any coworker or supervisor about this incident (Garg, Tr 4/7/98, pp 591-592, Tr 4/14/98, pp 1350, 1354-1355). As further set forth in the argument below, there was no actual evidence or testimony that anyone, including Mr. Habkirk or plaintiff Sharda Garg herself, perceived this assault by Sharda Garg on Mr. Habkirk to be opposition by Sharda Garg to sexual harassment, or "protected activity".

Plaintiff asserted that defendant Macomb County Community Mental Health Services retaliated against plaintiff for this 1981 "protected activity" beginning two years later, in 1983. At that time, plaintiff did not receive a promotion for which she applied. Plaintiff asserted that each of the 18 promotions or transfers she did not receive from 1983 through the time of trial were in retaliation for her protected activities (the silent swatting of Mr. Habkirk in 1981). The only evidence plaintiff claimed to support this conclusion was that Mr. Habkirk became "cold" to her after she hit him, and a friend and supervisor at some unspecified point between 1983 and 1995, said he believed plaintiff was not being promoted because Mr. Habkirk did not like her (Garg Tr 4/1/98, pp 122, 132, 134).

The second, alternative theory of retaliation was claimed to arise out of plaintiff's act of filing a union grievance in 1987. This occurred after plaintiff already, and consistently, had not received 11 positions for which she had applied since 1983. In

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this particular grievance (one of three she filed), plaintiff alleged that she was improperly denied two promotions in 1987 based on national origin discrimination by Mr. Kent Cathcart, one of her supervisors from 1986 until 1995 (Garg, Tr 4/2/98, pp 70, 75, 137, Tr 4/7/98, pp 572-573). Plaintiff's counsel claimed that the retaliation for plaintiff's complaint against Mr. Cathcart began two years later; plaintiff complained of the denial of her next seven requests for promotion between 1989 and 1997.

Plaintiff also complained of poor treatment by Mr. Cathcart from 1992 onward, and from other supervisors in and after 1995. Plaintiff, however, conceded she could not provide any time frame within which these acts of alleged "harassment" occurred, other that her notes which referred to these events occurring in 1992, 1993, 1995 and 1995. This, however, was at least five to eight years after the grievance (Garg, Tr 4/2/98, pp 104-106, Tr 4/3/98, pp 132-134, Exhibit E). Plaintiff testified:

> Q [By plaintiff's counsel] When we left court yesterday, some of your last testimony was instances that had happened to you that you felt were unfair and at LCC and the defendants and you were asked to review your notes when you indicated that you didn't remember everything that you had some notes that you might use to refresh your memory.
>
> My question is: At this point in time, if there are any instances that you now remember having looked at in your notes a couple of places and could you indicate from that material to the jury?
>
> A The notes were like going back from 1992. I had sporadic notes, of '92, '93, '94. There was -- I submitted most recently '94 and '95. Those other ones I read, and at that time my supervisor was Terry Falasa. She was promoted, and the notes about how she would come into my office, throw files on my desk, onto my face --
>
> * * *
>
> Q [By Ms. Ravitz] Okay. First of all did you discover any of those notes, any more references to the extent that you reviewed them to Kent Cathcart? You indicate what notes you haven't testified to?

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A Most of the notes were about my timing, I would come in at 8:32 and the next day I would be reprimanded. People come in at 8:40. They come in at 9:00.

THE COURT: I think she testified to that yesterday. Now, what we are looking for is the times, dates and so that she can be cross-examined. I mean, in speaking in generalities, that was the problem we had yesterday.

Now, she got a specific date and time and place, that's what we are looking for when you refresh your memory, so absent that, I won't allow any further testimony.

Q [By Ms. Ravitz] Is there any additional instances that you remember?

A I remember a lot of instances, but the dates I do not specifically remember. I didn't write down the date and times in my diary. I didn't write down as to the time it happened. I do not specifically remember dates. I remember the instances. [Plaintiff at Tr 4/3/98, pp 132-134.]

Defendant's Witnesses And Theory

Given the trial court's denial of defendant's motions before and during trial for partial dismissal based on the statute of limitations, plaintiff's allegations were vast in scope, covering a 17-year period by the time of trial, and as many job applications. Defendant was forced to call a multitude of coworkers and supervisors to justify the promotion or transfer decisions made, and to negate plaintiff's self-serving and unsubstantiated claims of mistreatment.

Defense witnesses included Susan Griggs, who had been in plaintiff's chain of command and interviewed her, Kenneth Courtney, Program Director at First Southwest, Kent Cathcart, who explained his hiring decisions, Keith Hoffman, North Area Services Manager, Cheryl Haack, the Assistant Director of Personnel Labor Relations who represented the employer in Garg's grievance, Donald Kern, Executive Director at the Macomb County Community Mental Health Services from 1980 to 1990, Linda Gipprich, who made one of the selections challenged by plaintiff, William Israel, the Director of

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Human Resources, and Donald Habkirk, who had been in plaintiff's chain of command, and then became Executive Director of Community Mental Health in 1990, when he had replaced Mr. Kern.

Witness after witness denied discriminating or retaliating against plaintiff (Slaine, Tr 4/7/98, p 472-474, Griggs, Tr 4/13/98, pp 971-972, Courtney, Tr 4/13/98, pp 1042-1043, Cathcart, Tr 4/13/98, pp 1071-1072, 1079, Hoffman, Tr 4/13/98, pp 1136-1138, Gipprich, Tr 4/14/98, pp 1226-1227). Defendant also presented evidence that many, many other white employees who did not complain about harassment or discrimination were not promoted (Slaine, Tr 4/7/98, pp 463-469).

Chronology

The following is a chronology of the jobs for which plaintiff unsuccessfully applied, the alleged protected activity, and the unfair treatment beginning in 1992 by Kent Cathcart, by other supervisors in 1995.

1978	Plaintiff begins employment at MCCHS
1981	Alleged opposition to sexual harassment by silent striking
1983	Two years later application for DD Outpatient Therapist III denied
1983	Denial of application for Epilepsy Counselor
1983	Denial of application for Family Support Coordinator
1984	Denial of application for MI Children's Therapist III
1985	Denial of application for MI Children's Therapist II
1985	Denial of application for Epilepsy Counselor
1985 or 1987	Denial of application for Emergency Services Liaison
1986	Denial of application for MI Children's Therapist II
1986	Denial of application for MI Children's Unit Supervisor - Therapist III

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1986	Denial of application for Program Supervisor
1987	Denial of application for DD Partial Day Services Unit Supervisor
1987	Denial of application for DD Outpatient Services Therapist III
1987	Grievance complaining of national origin discrimination
1989	Two years later, denial of application for DD Therapist III
1990	Denial of application for MI Adult Outpatient Therapist II
1992	Point as which three year statute of limitations would apply, absent discovery rule exception of Sumner v The Goodyear Tire and Rubber Co.
1992-1995	Allegedly poor treatment by Mr. Cathcart
1994	Denial of application for DD Outpatient Therapist III
1995	Plaintiff moves to First North, with allegedly poor working conditions
1995	Denial of application for Program Supervisor
1983-1995??	At some unspecified point, plaintiff's friend and supervisor says that he believes that plaintiff is not being promoted because Mr. Habkirk does not like her.
1995	Plaintiff files her complaint in this matter

Procedural History

By way of motion for summary disposition before trial (motion, Tr 4/15/96), and again by motion to dismiss/for directed verdict during trial (Tr 4/8/98, pp 803-805, see written motion for directed verdict), defendant sought dismissal of plaintiff's claims of retaliation or discrimination asserted as to promotions or transfers before 1992, more than three years before the commencement of this lawsuit on July 21, 1995. Defendant submitted that claims based on the denial of promotions in 1992 and earlier were barred by the three-year statute of limitations.

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Defendant's motion prior to trial was denied by opinion and order of July 10, 1996. The court ruled that plaintiff's claims were rendered timely by the continuing violation doctrine in Sumner v The Goodyear Tire and Rubber Company, 427 Mich 505 (1986) (opinion denying motion for summary disposition, pp 4-5). Defendant's application for leave to appeal this ruling was denied by the Court of Appeals, and the matter proceeded to trial in April 1998.

Following the close of plaintiff's proofs, defendant moved for a directed verdict. Defendant submitted that there was no evidence of retaliation by anyone at Macomb County Community Mental Health Services against Sharda Garg for the filing of the grievance in 1987 (Tr 4/9/98, p 778). Defendant further submitted that there was insufficient evidence as to the 1981 Habkirk incident (Tr 4/8/98, p 802). Defendant also again sought dismissal of the claimed loss of promotions which occurred more than three years before this suit was filed as barred by the statute of limitations (Tr 4/9/98, pp 803-805).

On defendant's renewed motion based on the statute of limitations during trial (Tr 4/8/98, pp 804-805), the court eventually agreed, and instructed the jury, that claims of discrimination for promotions denied before 1992 were barred. The court also ruled, and instructed the jury, however, that the statute of limitations did not bar or limit the retaliation theories (Tr 4/22/98, pp 9, 126). Plaintiff thus was permitted to assert damages under the retaliation theories for the denial of all 18 promotions and transfers, extending back to 1983. The court also denied the remainder of the motion for directed verdict (Tr 4/22/98, p 136).

The jury was specifically instructed by the court with respect to plaintiff's two, separate retaliation theories (Tr 4/22/98, pp 127-128). The jury returned a verdict

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finding no national origin discrimination. The jury did, however, find for plaintiff on her retaliation theories based on her opposition to sexual harassment "or" her filing of a union grievance (Tr 4/23/98, verdict form).

This application is submitted by defendant Macomb County Community Mental Health Services in support of its request for review by this Court, and reversal of the judgment and entry of judgment of no cause for action in defendant's favor or, alternatively, a new trial.

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STANDARD OF REVIEW

A directed verdict is appropriate where no factual question exists upon which reasonable minds might differ. Meager v Wayne State University, 222 Mich App 700, 707-708 (1997). Similarly, judgment notwithstanding the verdict should be granted pursuant to MCR 2.610 where the evidence, viewed in a light most favorable to the non-moving party, fails to establish a claim as a matter of law. Orzel v Scott Drug Company, 449 Mich 550, 557-558 (1995). The ruling on both motions is reviewed de novo. Id.

The decision whether a claim is barred in whole or in part by the statute of limitations is also reviewed de novo. Poffenbarger v Kaplan, 224 Mich App 1, 6 (1997).

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ARGUMENT

I PLAINTIFF FAILED TO ESTABLISH A PRIMA FACIE CASE AS TO EITHER OF HER TWO THEORIES OF RETALIATION FOR ENGAGING IN ACTIVITY PROTECTED BY THE ELLIOT-LARSEN CIVIL RIGHTS ACT, REQUIRING A DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING THE VERDICT AS A MATTER OF LAW.

The evidence was insufficient to establish retaliation by Macomb County Community Mental Health Services from 1983 to 1995 against Sharda Garg for engaging in protected activity either because she allegedly "opposed sexual harassment" in 1981, "or" because she filed a charge or complaint about being discriminated against" in 1987 (Verdict form).

The elements of a claim for retaliation for engaging in activity protected by the civil rights laws are different than and more exacting than are the elements of a straightforward claim of discrimination based on race, national origin, etc. To establish a prima facie case of unlawful retaliation under the Civil Rights Act, MCL 37.2701, it is plaintiff's burden to show four specific elements, that

> (1) [S]he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. Polk v Yellow Freight System, Inc, 876 F2d 527, 531 (CA 6, 1989); see also Booker v Brown & Williamson Tobacco Company, 879 F2d 1304, 1310 (CA 6, 1989); Kroll v The Disney Store, Inc, 899 F Supp 344, 348 (ED Mich 1995). [DeFlaviis v Lord & Taylor, Inc, 223 Mich App 432 (1997).]

Plaintiff here failed to meet that burden as she failed to establish at least one of these elements with respect to both retaliation theories. The lower courts' refusal to grant a directed verdict or judgment notwithstanding the verdict has allowed a true travesty of justice to occur. This case provides the Court with an opportunity both to provide guidance with regard to the sufficiency of proofs in a retaliation claim, but also

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to correct what is a clear wrong. The was no evidence to support these claims, only speculation and conjecture.

A. Plaintiff Failed To Establish A Prima Facie Case Of Retaliation For Her Alleged Opposition To Sexual Harassment In 1981, Where There Was No Evidence Of Opposition To Sexual Harassment, Of Knowledge By The Employer Of Opposition To Sexual Harassment, Or Of A Causal Relationship To Adverse Employment Actions Occurring Two To 14 Years Later.

There was no testimony or evidence from which reasonable persons could find that Sharda Garg's act of "opposition" in 1981--silently striking an individual who tapped her shoulder in the hall, whom she only after discovered to be a supervisor, Mr. Habkirk --was intended by plaintiff to be, or was thereafter known by anyone else to be, opposition to sexual harassment, and thus protected activity. There was also no evidence from which a jury could conclude that Sharda Garg's swinging at Mr. Habkirk in 1981 was a proximate cause of the complained-of adverse employment actions which did not begin until two years later.

The conclusory assertion by the Court of Appeals that the evidence did support inferences of each of these elements is in error.

1. There was no evidence from which it could be concluded that Sharda Garg intended by the swatting incident to engage in protected activity/opposition to sexual harassment.

Plaintiff failed to establish the first element of a retaliation claim--that Sharda Garg engaged in a protected activity. DeFlaviis, supra. Plaintiff's counsel asserted that Mr. Habkirk "sexually harassed female employees" when he snapped one employees bra and pulled on another's underpants, and that plaintiff was engaged in protected activity when, in 1981, she "slugged him, forcefully opposing his practice of sexual harassment" (see e.g. plaintiff's JNOV response brief, p 2). The evidence, however, in

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particular plaintiff's own testimony recounting events, did not support these inferences and assertions of counsel.

First, and most fundamentally, Sharda Garg never herself testified that when she struck out in response to a tap on the shoulder, she intended to oppose sexual harassment, or that she was even thinking about sexual harassment. Although asked, she would not characterize the touching as improper. Plaintiff testified it was just a "touch" on her "shoulder," which she reflexively, automatically swatted away before she knew who it was:

> Q When you were being touched in the back, did you -- what was your impression whether there was something improper or proper being done?
>
> A It was a very automatic reaction on my part. I felt somebody touching me, and I just turned around and swung at him. [Garg, Tr 4/1/98, p 129, Exhibit D.]

Throughout trial, plaintiff's counsel repeatedly affirmatively represented that plaintiff herself was never sexually harassed (closing at Tr 4/22/98, pp 66, 68-69, 74, 113-114). Plaintiff's counsel declared: "Let me be perfectly clear.... We are not saying that it was her belief that she was being sexually harassed. . ." (argument on directed verdict motion at Tr 4/8/98, pp 807-810).

Second, any inference that plaintiff intended to oppose sexual harassment was negated by the fact that plaintiff could not even establish that the only two incidents of alleged sexual harassment of other employees of which there was evidence occurred before plaintiff struck Mr. Habkirk. Although asked to indicate whether incident with Mr. Habkirk occurred "before or after" these two incidents of alleged sexual harassment (the snapping of a bra, and the pulling of a panty), Sharda Garg could only say "it was around the same time." (See Garg at Tr 4/1/98, pp 126-127, Exhibit D). Plaintiff could

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not possibly have been opposing acts of harassment by slugging her supervisor when she could not even say those acts had yet occurred when she did so.

Third, any inference that plaintiff intended to oppose sexual harassment was further negated by the fact that plaintiff did not even know whom she was slugging, and did so "reflexively," as one would when startled. Plaintiff testified she "automatically" swung around and knocked the hand away, and did not even know at whom she was reflexively swinging when she did so:

> Q Okay. How did you hit him?
>
> A I just went with my hand. You know, just -- just swung it whoever it was behind me.
>
> Q Okay. And who did it turn out to be?
>
> A It turned out to be Mr. Habkirk. [Garg, 4/1/98, p 127.]***
>
> THE WITNESS: All I recall is his touching me from the back, my swinging at him. **I didn't know who was in behind me**, I just turned around and took a swing at him. [Garg, Tr 4/1/98, p 130, Exhibit D.]

As plaintiff did not know it was an alleged sexual harasser who was tapping her on the shoulder, and swung reflexively, she could not possibly have had the intent of opposing sexual harassment by so acting.

The Court of Appeals lists several of these facts and then concludes, inexplicably that "reasonable jurors could conclude that plaintiff, by slugging Habkirk, sufficiently 'raise[d] the specter' that she opposed a violation of the civil rights act." Defendant submits that the facts simply do not logically permit such a conclusion. Without evidence at least that Sharda Garg believed she was "opposing" or even thinking about perceived sexual harassment, it is absolute speculation to conclude she was engaged in activity protected by the Elliot Larsen Civil Rights Act.

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Under analogous circumstances, in Mitan v Neiman Marcus, 240 Mich App 679 (2000), the Court of Appeals affirmed the grant of summary disposition of a retaliation claim for the absence of sufficient evidence that the plaintiff ever engaged in protected activity under the Handicappers Civil Rights Act. In Mitan, plaintiff had complained to the employer that her supervisor had engaged in "job discrimination," but did not suggest that this "discrimination" was related to her disability. Because plaintiff's complaint did not imply that she had opposed a violation of the Handicappers Civil Rights Act, the Court held that plaintiff had failed to show she was engaged in protected activity. Likewise there was no evidence from which a reasonable person could conclude that plaintiff was or believed herself to be engaged in protected activity when she reflexively swatted Mr. Habkirk.

2. The employer could not possibly have known the employee was engaged in "protected activity," where plaintiff never told anyone, including Mr. Habkirk, that she was opposing sexual harassment when she silently, reflexively struck him for an inoffensive tap on the shoulder.

On the facts in evidence, it was impossible to find the second element of a retaliation claim--that the employer knew that the employee was engaged in "protected activity", i.e., opposition to sexual harassment. DeFlaviis, supra. The Court of Appeals in its opinion completely fails to address this element; the Court only purports to address the first (opposition to sexual harassment) and fourth (causation) elements (Slip opinion, p 3).

Sharda Garg conceded she told no one at Macomb County Community Mental Health that she had hit Mr. Habkirk or, more importantly, why she had done it. Plaintiff testified:

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Q And that Mr. Habkirk came up behind you and touched you and you swung at him, correct?

A That is correct.

Q No words were spoken between the two of you, right?

A That is correct.

Q You remember anyone else being there?

A No.

Q You didn't report this to anyone, did you?

A No.

* * *

Q Okay. All right. Did you report him to anyone?

A No.

Q Did you file a grievance against him for doing that?

A No.

Q Did you report it to your union representative at that time?

A No, I did not do anything about it. [Garg, Tr 4/1/98, p 131, Exhibit D].

* * *

Q Did you ever discuss this with Mr. Habkirk in his capacity in any way?

A No. [Garg, Tr 4/7/98, pp 591-592, Exhibit E].

Plaintiff repeatedly conceded she never made any written or oral complaint about Mr. Habkirk or sexual harassment (Garg at Tr 4/7/98, pp 591-592, 4/15/98, pp 1345-1355, Exhibit E).

Given the evidence, how in the world was Mr. Habkirk himself, or anyone else, to know Sharda Garg was "opposing sexual harassment" when she silently and without explanation swatted at Mr. Habkirk in a hallway when he tapped her on the shoulder?

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Plaintiff did not speak to Mr. Habkirk, and told no one else about the incident. There was nothing about the event itself which could have lead Mr. Habkirk to guess that plaintiff was "opposing sexual harassment." As noted above, there was no evidence or claim that the tap on the shoulder was or was perceived to be improper or sexual in nature. There was no evidence this occurred after or was in any way connected to the two incidents with other employees. Mr. Habkirk had absolutely no reason to know Sharda Garg was "opposing sexual harassment" when she struck him.

Finally, all promotion decisionmakers testified they did not know that plaintiff "opposed sexual harassment". Those at Macomb County Community Mental Health Service who had been involved in decisions regarding plaintiff's requests for promotion or transfer between 1983 and 1997 all testified they did not know plaintiff had "opposed sexual harassment". Each and every witness testified that they had no knowledge of the swatting incident (Margaret Demery, Tr 4/8/98, pp 738, Susan Griggs, Tr 4/13/98, pp 971, 976, Ken Courtney, Tr 4/13/98, pp 1043, Kent Cathcart, Tr 4/13/98, p 1079, Keith Hoffman, Tr 4/13/98, pp 1136-1138, Donald Kern, Tr 4/14/98, pp 1207-1208, Linda Gipprich, Tr 4/14/98, p 1227, Slaine, Tr 4/6/98, p 331, Bilienen dep, pp 22, 47-48). Mr. Habkirk himself had no recollection of this incident at the time of trial 17 years later (Habkirk, Tr 4/14/98, p 1262).

Given Sharda Garg's 14-year long silence, reasonable persons could not possibly find that this "swatting" incident was understood by anyone at Macomb County Community Mental Health Services (by Mr. Habkirk or anyone else) to have been protected activity, i.e., opposition to sexual harassment.

In Crumpton v St Vincent's Hospital, 963 F Supp 1104 (ND Ala, 1997), the court granted summary judgment for a similar failure to establish that the plaintiff's activity

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constituted opposition to a violation of the Civil Rights Act. Plaintiff there claimed that she was denied a pay increase in retaliation for her comments about racial harassment. Plaintiff claimed that her superior harassed her in that she was "constantly [after her] about signing" a form regarding a retirement fund, making her feel as if she had "stolen the money." Crumpton, 1119.

The court in Crumpton held that plaintiff's complaint about this "harassment", without an indication that she perceived it as racial harassment, was insufficient to establish engagement in statutorily protected activity. The court reasoned:

> Plaintiff admits that she complained to no one about the perceived racial harassment. . . . Based on the evidence submitted, plaintiff has failed to establish that her conduct qualifies as engagement in a statutorily protected activity. Simply complaining about a supervisor's conduct or refusing to comply with a request to sign a form does not constitute protected activity in this context. In order to be protected activity, plaintiff must present evidence showing that St. Vincent's management knew that her concern or complaints related in some way to race and a claim of being discriminated against on that basis. There has been no evidence presented that prior to the commencement of this action St. Vincent's had notice of the fact that plaintiff's initial refusal to sign the Fidelity retirement account form and her disagreement with putting the "cash back" funds in a retirement account rather than paying her directly was thought by plaintiff to be race discrimination or racial harassment in any way.
>
> Furthermore, plaintiff has presented no evidence indicating that the incident with the form was not totally unrelated to her failure to get a pay raise or bonus. While it is clear that plaintiff's supervisor, and possibly other management officials, were aware of plaintiff's failure to sign the form concerning the distribution of her "cash back" benefits, there is no evidence that anyone in management knew that plaintiff considered the incident to be "racial" in nature, much less "racial harassment." [Crumpton, 1119, emphasis added.]

Here, as in Crumpton, there was no evidence presented that Macomb County Community Mental Health Services or Mr. Habkirk had notice that the swatting of Mr. Habkirk was thought by plaintiff to be opposition to sexual harassment. Plaintiff's speculation was insufficient to meet her burden of proof on this first element.

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There was only speculation, and insufficient evidence to meet plaintiff's burden of proof on this second element of a retaliation claim.

3. There was insufficient evidence of a causal connection between the alleged protected activity and the adverse employment actions beginning more than two years later.

The only evidence claimed by plaintiff to show a retaliatory motive and causal connection to the denial of job promotions two to 14 years later, and relied upon by the lower courts here, was (1) plaintiff's testimony that Habkirk became "cold" to her after she hit him (Tr 4/1/98, pp 122, 132), and (2) plaintiff's claim that at an unidentified point in time, Bob Slaine (a friend and supervisor) told plaintiff's husband that it was his "opinion" that plaintiff was not being promoted because Mr. Habkirk "did not like her" for a never explained reason (Garg, Tr 4/1/98, p 134)[2]. (Transcript excerpts attached as Exhibit F).

This evidence clearly is insufficient to support a finding of a causal connection. First, while plaintiff claimed Mr. Habkirk became "cold" to her after the swatting incident in 1981, there is no basis in evidence or common sense that this coldness was because of the protected nature of her conduct, rather than simply because he had without explanation been hit by a coworker in the hallway. There was also no evidence for how long this "coldness" was experienced by Ms. Garg, and no direct evidence that it had

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[2] Mr. Slaine unequivocally denied making this comment (Tr 4/6/98, p 364). Additionally, all witnesses involved in promotions and transfer decisions testified Mr. Habkirk was not involved in these decisions. (Margaret Demery, Tr 4/8/98, p 746, Susan Griggs, Tr 4/13/98, pp 967, Ken Courtney, Tr 4/13/98, p 1038, Ken Cathcart, Tr 4/13/98, p 1079, Donald Kern, Tr 4/14/98, pp 1207, Linda Gipprich, Tr 4/14/98, p 1227, Slaine, Tr 4/7/98, pp 473-474, Bielenin dep, 21-22, Hoffman, Tr 4/13/98, p 1136). This was confirmed by Donald Habkirk's own testimony (Habkirk, Tr 4/14/98, pp 1260).

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any role in the denial of a promotion for which she applied beginning 2 years later in 1983, or in those which she was thereafter denied for the next 14 years.

Likewise, Mr. Slaine's subjective opinion expressed at some unknown point over the next 14 years that Mr. Habkirk did not "like" plaintiff, was insufficient to establish an inference that Mr. Habkirk did not like plaintiff because of her engagement in protected activity in 1981.

In Feick v County of Monroe, 229 Mich App 335 (1998), the Court of Appeals affirmed the grant of summary disposition on a retaliation claim for a similar absence of evidence of causation. Plaintiff, a former chief prosecuting attorney, alleged that defendants retaliated against her for filing a complaint with the Equal Employment Opportunity Commission by terminating her and not subsequently re-hiring her for various positions. Holding that there was insufficient evidence of a causal link as a matter of law, the Court reasoned:

> Plaintiff's retaliation claim fails because she presented no evidence from which a reasonable fact-finder could infer that there was a causal connection between her EEOC complaint and defendant's adverse employment actions. Kocenda v Detroit Edison Company, 131 Mich App 721, 726; 363 NW2d 20 (1984); see also Parnell v Stone, 793 F Supp 742, 746 (ED Mich 1992) aff'd 12 F3d 213 (CA 6, 1993). The only evidence plaintiff presented was that Swinkey testified at deposition that he was not pleased that plaintiff had filed an EEOC complaint and that he had talked about the complaint to one other person. This was insufficient to establish a causal link between plaintiff's EEOC complaint and the adverse employment actions. The circuit court properly dismissed plaintiff's retaliation claim for failing to establish that a genuine issue of material fact remained regarding whether defendants retaliated against her for filing her discrimination complaint. [Feick, supra.]

Likewise here, plaintiff failed to present evidence establishing any causal connection between "protected activity" in her silent swatting of Mr. Habkirk in 1981 and the denial of promotions beginning in 1983.

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Under an analogous failure of proof, the court in Maynard v City of San Jose, 37 F3d 1396, 1405 (CA 9, 1994), vacated a judgment for plaintiff. While plaintiff there established that the defendants responsible for the adverse employment action were angry at her, there was no evidence that they were angry or acted because of her protected activity. The court reasoned:

> [W]hile there is evidence that Daniels, Atkison, and Jackson retaliated against Maynard, there is an absence of evidence that this retaliation occurred because Maynard assisted a black person. The record reflects instead that they were angry and embarrassed that Maynard had publicly exposed the post-dated letter.

Likewise here there was no evidence that if Mr. Habkirk disliked plaintiff, he disliked her because of protected activity by her, i.e., because he believed she had opposed sexual harassment when she swatted him.

Additionally, the two to 14 year lapse in time between the alleged protected activity/opposition to sexual harassment by silent swatting, and the adverse employment action further negates any causal connection. From the time of the silent slugging in 1981, until 1983, plaintiff received all very good evaluations (Tr 4/1/98, pp 116-117). It was not until 1983, two years after the silent swatting that plaintiff claimed the first "retaliation" or adverse employment action occurred when she was denied a promotion. This two-year lapse in time conclusively negates any circumstantial causal connection here.

Time and time again the federal courts have held the such a temporal lapse as existed here between the protected activity, and the much later alleged retaliatory employment action precludes a finding of causation as a matter of law. In Clark County School District v Breeden, ___ US ___; 150 LEd2d 248 (2001), the Supreme Court reinstated summary judgment on a retaliation claim under Title VII. Holding that a 20-

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month delay between the alleged protected activity and the retaliation was insufficient to support a finding of a causal relation, the Supreme Court approved of and followed decisions holding that a delay of even several months between the activity and the retaliation is insufficient to establish causation:

> The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that temporal proximity must be "very close," [citations omitted]. Action taken (as here) 20 months later suggests, by itself, no causality at all.

Similarly, the delay of two or more years after the alleged protected activities here is insufficient to establish causation. See also decisions by the Courts of Appoeals applying these principles even before Breeden. Oliver v Digital Equipment Corp, 846 F2d 103 (CA 1, 1988) (affirming summary judgment for absence of a prima facie case of retaliation where there was a 33-month gap between the filling of an EEOC complaint and the employee's discharge); King v Town of Hanover, 116 F3d 965 (CA 1, 1997) (summary judgment affirmed where only evidence of retaliation was that employee was disciplined five months after his complaint to a supervisor about sexual harassment); Mesnick v General Electric Co, 950 F2d 816 (CA 1, 1991) (summary judgment affirmed where nine month delay between EEOC complaint and termination negated inference of retaliation); Hughes v Derwinski, 967 F2d 1168 (CA 7, 1992) (summary judgment affirmed where four-month gap between filing of administrative complaint and disciplinary letter and three-year gap between filing of complaint and termination not sufficiently related to show retaliation); Samuelson v Durke/French/Airwick, 976 F2d 1111 (CA 7, 1992) (affirming summary judgment as a three year time lapse between an EEOC claim and termination discounted the causal connection between the two events); White v McDonnell Douglas Corp, 985 F2d 434 (CA 8, 1993) (summary

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judgment affirmed where black employee failed to show he was the victim of retaliation when he was laid off one year after judgment was entered against him in his race discrimination suit); Feltmann v Sieben, 108 F3d 970 (CA 8, 1997), cert den 118 S Ct 851 (1998) (reversing a judgment for plaintiff and directing the entry of judgment notwithstanding the verdict for the reason that the fact of termination six months after an incident is by itself insufficient to support a claim of causal connection); Candelaria v EG & G Energy Measurements, Inc, 33 F3d 1259 (CA 10, 1994) (evidence was insufficient as a matter of law to support trial court's factual finding of retaliation, because adverse employment actions in 1981 were not in "sufficiently 'close temporal proximity'" to plaintiff's 1978 complaint to support an inference of retaliatory motive).

Such a lapse of time negated causation and lead to reversal of a verdict for plaintiff in Farino v Renaissance Club, unpublished opinion per curiam of the Court of Appeals, decided June 29, 1999 (Docket No. 206031, Exhibit E).

Each among this plethora of decisions graphically demonstrates that a two to 14 year lapse between the alleged protected activity and the adverse employment action/retaliation negates any inference of causation. In such a case there simply is no evidentiary basis upon which to find the adverse employment action to be retaliation because of the temporally distant protected activity.

B. Plaintiff Failed To Establish A Causal Connection Between A Grievance In 1987 Complaining Of National Origin Discrimination, And The Continued Denial Of Promotions Beginning In 1989, Or Alleged Poor Treatment By Supervisors Beginning In 1992.

There also was insufficient evidence to support plaintiff's second theory of retaliation, purportedly for filing a grievance in 1987 complaining of national origin discrimination by supervisor Kent Cathcart. The proofs failed to show any causal

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relationship between the grievance in 1987, and adverse employment action--the continued denial of promotions beginning in 1989, and allegedly poor treatment by supervisors beginning in 1992.

Plaintiff did not receive 11 promotions or transfers for which she applied between 1983 and 1987. During that time, plaintiff filed three unsuccessful grievances alleging that she was improperly denied these promotions (Garg, Tr 4/2/98, p 78). Plaintiff filed one grievance in 1985, and two more grievances in February and June of 1987. Plaintiff claimed national origin discrimination (by a supervisor Kent Cathcart) only in the third grievance in June of 1987, challenging her failure to get jobs obtained by Margaret Porkka (Garg, Tr 4/2/98, pp 70, 75, 137, Tr 4/7/98, pp 572-573).

Plaintiff's counsel asserted at trial that the denial of Sharda Garg's next seven requests for promotion, beginning two years later in 1989 and occurring until 1997, were in retaliation either by Mr. Habkirk for opposing sexual harassment in 1981, or by Mr. Cathcart for the allegations of discrimination in the third grievance. Plaintiff, however, produced no direct or circumstantial evidence of a causal connection between her inclusion in her third union grievance in 1987 of a complaint of national origin discrimination, and subsequent adverse employment actions occurring between two and ten years later.

First, while as the Court of Appeals notes, Mr. Cathcart, who was plaintiff's supervisor from 1986 until 1995, obviously knew about the 1987 grievance, there was no evidence that Mr. Cathcart was upset, angry or even bothered by the 1987 grievance. There was no evidence of any statement by him or anyone else about or critical of that particular grievance. It was just one of many grievances routinely filed by union members, and the third filed by Sharda Garg.

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Further, the evidence affirmatively established that none of the interviewer/decisionmakers involved in the promotion decisions subsequent to the grievance even knew about the grievance, other than, of course, Kent Cathcart (Demery, Tr 4/8/98, p 738, Griggs, Tr 4/13/98, p 970, Courtney, Tr 4/13/98, p 1043, Hoffman, Tr 4/13/98, p 1137-1138, Gipprich Tr 4/14/98, p 1138). Mr. Cathcart was involved in only two of those promotions, one in 1987, and one in 1994. There was no evidence he was involved in or influenced any of the other promotions. (Id.)

Moreover, there was no evidence to circumstantially point to retaliation by Mr. Cathcart for the grievance as an explanation for Sharda Garg's continued failures to secure promotions. The denial of promotions was nothing new--there was absolutely no evidentiary basis to conclude that the denials of seven requested promotions after the 1987 grievance, were for reasons any different were the denial of the 11 requested promotions before that time. Plaintiff had been denied promotions due to her own inadequacies since 1983. There was no evidence that anything changed after the grievance in 1987. There was no basis in logic or evidence to connect the 1989 denial of a promotion to the 1987 grievance, rather that the failings which had prevented Sharda Garg from being promoted since 1983.

Finally, and critically, there was no adverse employment action which occurred close enough in time to the 1987 grievance to allow any inference of a causal connection. The next denial of promotion after the grievance occurred in 1989, two years later. As set forth in extensive detail in argument A(3) above, such a lapse of time of two or more years between the alleged protected activity and the adverse employment action conclusively negates the existence of any implied causal connection. Where such a period of time passes before an adverse employment action,

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the protected activity cannot be said to be either a significant factor in the decision to discharge, Polk, supra, or a likely reason for the adverse action, Zanders, supra. See Clark County School District v Breeden, supra.

The Court of Appeals' assertion that a causal connection was shown, despite the two year gap between the protected activity and the adverse employment action because "plaintiff was denied *the first promotion that she sought after the filing of the grievance*" (emphasis by Court of Appeals) simply makes no sense. This is precisely the type of temporal gap to which the decisions cited above are addressed. The fact that plaintiff had not applied for a promotion sooner does nothing to connect the denial of a promotion to one of three grievances filed two years earlier. This temporal gap must be found by any objective person to negate any circumstantial causal connection.

The lower courts suggested that a causal connection was shown between the grievance and plaintiff's continued loss of promotions because plaintiff was "harassed" by Mr. Cathcart and others in the years after the grievance. However, there was no showing that these acts of "harassment" occurred because of, or at a point sufficiently close in time to the grievance, to support any inference of a causal connection. Plaintiff conceded she could not provide any time frame within which these acts of alleged "harassment" occurred, other than her notes which referred to these events occurring in 1992, 1993, 1995 and 1995. This, however, was at least five to eight years after the grievance (Garg, Tr 4/2/98, pp 104-106, Tr 4/3/98, pp 132-134, Exhibit E).

This evidentiary and time gap clearly negates any possible inference of a causal connection. There was no evidence to place these events any closer to the grievance in 1987, or before the denial of the promotion in 1989.

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Further, the alleged acts of "harassment" by Mr. Cathcart (Tr 4/2/98, pp 94-95, 96-97), were never to be shown of such a nature as to be related to the grievance. These instances of unpleasantness included things like Mr. Cathcart telling plaintiff not to leave her work to look at a rainbow, and reprimanding her once for being late for work (Garg at Tr 4/2/98, pp 94-97, Exhibit E). Such trivial instances clearly fail to establish any such causal connection. They are "insufficiently serious" to support an inference of retaliatory intent. See Feltmann, supra.

Evidence, as noted by the Court of Appeals, that Mr. Cathcart allegedly once used a racial epithet in referencing an African American has no logical tendency to show that Cathcart retaliated against Ms. Garg for filing a grievance complaining of national origin discrimination (as an Indian), particularly where the jury found that Ms. Garg was not discriminated against! Plaintiff had to connect the acts of retaliation to the grievance by direct evidence or circumstantial evidence supporting a rational inference; this plaintiff was unable to do.

There was no direct or circumstantial evidence that these alleged acts of retaliation were "because of" retaliation for the grievance containing the discrimination complaint. This absence of a causal connection is identical to that held fatal to the plaintiff's claim in Feick v County of Monroe, supra; Farino v Renaissance Club, supra; and Maynard v City of San Jose, supra (all addressed in detail in argument I A above). As in Feick, plaintiff failed to establish any causal connection between her complaint of discrimination in her union grievance in 1987, and the denial of promotions beginning two years later, or the various forms of "harassment," with either no time frame established, or occurring years after the grievance. Indeed, this plaintiff had less evidence than did the plaintiff in Feick; there was here not even any comment by any of

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plaintiff's supervisors, or by the alleged harasser, even referencing the complaint of discrimination within, or the grievance filed in 1987.

On the other hand, there also was no evidence that these incidents of unpleasantness occurred only after and thus, inferentially because, Mr. Cathcart became aware of the grievance. Plaintiff complained generally that she did not get along with Mr. Cathcart (see Tr 4/2/98, pp 94-100). There was no testimony that this began only after the grievance was filed, or that something changed in the way Mr. Cathcart treated plaintiff after the grievance.

Moreover, negating any inference that Mr. Cathcart did not like plaintiff because of the grievance is the fact plaintiff received good evaluations while Mr. Cathcart was in her chain of command, and after the grievance had been filed (Garg, Tr 4/7/98, p 589, Tr 4/15/98, p 1364). He also "went to bat" for her regarding flex-time (Garg Tr 4/7/98, pp 577-579).

The lower courts clearly erred in refusing to direct entry of a directed verdict as to both of these retaliation theories or judgment notwithstanding the verdict. These claims asserted by counsel were without sufficient evidentiary support to support a finding of all four elements of a retaliation theory.

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II ALTERNATIVELY, A NEW TRIAL IS REQUIRED BECAUSE OF THE SUBMISSION TO THE JURY OF AT LEAST ONE THEORY OF RETALIATION LIABILITY WHICH WAS UNSUPPORTED BY THE PROOFS, AND AS TO WHICH A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

The jury found retaliation with respect to some or all 18 job promotions or transfers, because plaintiff "opposed sexual harassment or because she filed a charge or complaint about being discriminated against." (Verdict form, emphasis added.) As set forth in argument I above, defendant submits that there was insufficient evidence to support either of these theories, requiring judgment notwithstanding the verdict.

If, however, the Court disagrees in part, and finds there was sufficient evidence of retaliation based on one, but not both of these theories, a new trial is required. Both retaliation theories and the claimed improper denial of all 18 promotions went to the jury here, notwithstanding defendant's motion for directed verdict. This is an error which requires the grant of a new trial.

Michigan law is clear that submission to the jury of an issue or theory not properly supported by the evidence is error which requires reversal and the grant of a new trial. Baker v Alt, 374 Mich 492, 497 (1965), Burt v Detroit, GH & M Ry Co, 262 Mich 204 (1933), Berwald v Kasal, 102 Mich App 269 (1980), Miles v VanGelder, 1 Mich App 522, 535-536 (1965).

Michigan's appellate courts on numerous occasions likewise have held that a new trial is required where, as here, a case is submitted to the jury on several theories of liability, one of which is not properly in the case. Where it cannot be determined from the verdict upon which theory the jury relied, reversal and a new trial is required. Funk v General Motors Corp, 392 Mich 91, 110-111 (1974), Leonard v Farmers' Mutual Ins Co

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of Monroe and Wayne Counties, 192 Mich 230 (1916), Rancour v Detroit Edison Co, 150 Mich App 276, 289 n 2 and accompanying text (1986).

If this Court determines that only one of these two retaliation theories was unsupported by the proofs (for the reasons set forth in argument I above), such that a directed verdict should have been granted as to that theory, the submission of that theory requires a new trial.

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III ALTERNATIVELY, THE CONTINUING VIOLATIONS DOCTRINE SHOULD NOT BE APPLIED TO AVOID THE PLAIN LANGUAGE OF THE STATUTE OF LIMITATIONS WITH RESPECT TO CLAIMS OF RETALIATION BASED ON THE SPECIFIC AND CONCRETE DENIAL OF 14 REQUESTS FOR PROMOTION MORE THAN THREE YEARS BEFORE THIS SUIT WAS FILED (FROM 1983 TO 1992).

In the alternative, even if either or both of plaintiff's theories were supported by sufficient proof, a new trial is required where the vast majority of plaintiff's claims, those based on the denial of promotions beyond the three year period of limitations, from 1983 to 1992, should have been dismissed as barred by the statute of limitations. The continuing violations doctrine of Sumner v The Goodyear Tire and Rubber Company, 427 Mich 505 (1986), was erroneously extended here to negate the plain language of the statute of limitations, and permit claims based on 14 concrete, discrete acts alleged to be retaliatory, occurring 3 to 14 years before suit was filed.

Although the Sumner Court adopted the continuing violations doctrine from federal Title VII decisions, and although the Court of Appeals here conceded that federal law since interpreting the doctrine supports defendant's position here, the Court of Appeals declined to apply federal law because it is not "absolutely binding." (Slip opinion, p 4, n 9). This is clear error which should be corrected by the Court.

A. The Continuing Violation Doctrine Was Borrowed From The Federal Courts To Avoid The Plain Language Of The Statute Of Limitations Where Plaintiff Was Not Likely To Discover A Claim.

An action for employment discrimination under the Elliot-Larsen Civil Rights Act must be brought within three years after the cause of action accrued. MCL 6500.5805(9), Mair v Consumers Power Co, 419 Mich 74, 77-78 (1984). MCL 600.5805(1) and (9) provide:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first

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accrued . . . the action is commenced within the periods of time prescribed by this section.

(9) The period of limitations is 3 years after the time of death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

As to promotions and transfers more than three years before this suit was filed, plaintiff's claims of retaliation were time-barred. The lower courts erred in declaring that plaintiff's retaliation claims were saved by the continuing violations doctrine applied in Sumner v The Goodyear Tire and Rubber Company, 427 Mich 505 (1986), to a retaliation claim.

In Sumner, the Court adopted from the federal courts, in their application of Title VII of the Federal Civil Rights Act, the doctrine of "continuing violation" as a common law doctrine to avoid strict application of the statute of limitations for discrimination claims under the civil rights' cases. Sumner, 526-527. The doctrine is similar to the discovery rule, in extending the time to commence an action where an employee may not have realized that discrimination or a civil rights violation may have occurred. Sumner, pp 528-529, n 8. "It is properly applied where the employee, by the actions of the employer or due to other circumstances, is denied notice of the discriminatory act or is, in some other way, prevented from making a timely filing." Id.

The Court in Sumner adopted the following list of factors, from Berry v LSU Board of Supervisors, 715 F2d 971, 981 (CA 5, 1983), to be applied in the evaluation of whether the alleged continuous course of discriminatory conduct is of a nature to which the continuing violation doctrine would be applicable:

> "'The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a bi-weekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is

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> degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? [Sumner, supra, 538, quoting Berry, supra, 981.]

As noted by the Court in Sumner, 538, the last of these factors, the permanence or discovery rule generally is regarded as the core and most important element of the Berry test. See Selan v Kiley, 969 F2d 560, 565 (CA 7, 1992).

B. The Continuing Violation Doctrine Should Not Be Applied To These Claims For Retaliation Where, Both Inherently By The Nature Of Such Claims And Under The Particular Facts Here, Plaintiff Was Aware Of The Very Concrete and Discrete Acts Of Alleged Retaliation.

Exceptions to the statute of limitations, particularly judicially imposed exceptions, are narrowly construed by this Court and permitted only when absolutely necessary and consistent with the language of the statute at issue. See Mair v Consumers Power Co, 419 Mich 74, 79 (1984) (statutory tolling not applicable to administrative proceeding), Secura Ins Co v Auto Owners Ins Co, 461 Mich 382 (2000) (judicial tolling may not be applied in the absence of specific statutory language permitting it). Regardless of whether Sumner may continue to be viable in other contexts, it should not have been applied here to negate the plain language of the statute of limitations as to injuries of which plaintiff was fully aware more that three years before this suit was filed.

The continuing violations doctrine should not be extended to a retaliation claim due to the very nature of the claim. It is true that an employee may not realize in many cases that the motive for an adverse employment action is discrimination. However, the fundamental premise of a retaliation claim is that the employee has already knowingly exercised a right under the Elliot Larsen Civil Rights Act, for which they are thereafter retaliated. It will only be in the most unusual case that such an employee would not be

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aware of and vigilant for an act of retaliation. The rationale for the continuing violations doctrine, therefore, is generally not applicable to retaliation claims.

Second, the specific nature of the claimed protected activity and the acts of retaliation here clearly preclude application of the continuing acts doctrine. Because there were separate, identifiable and temporally distinct alleged acts of retaliation consisting of the denial of 18 promotions over a 14-year period, each of which was permanent and immediately known to plaintiff, the continuing violations doctrine is inapplicable. This conclusion is mandated by the discovery rule rationale for this doctrine, as recognized by the federal courts from which the Sumner Court borrowed the doctrine.

There was no evidence or claim by plaintiff herself that she did not realize she was being retaliated against when she was denied the promotions she requested. To the contrary, plaintiff here claimed that Mr. Habkirk had retaliated against her since "day one." (Tr 4/7/98, p 548). Plaintiff testified she believed she had been retaliated against by Mr. Habkirk because of Mr. Slaine's alleged statement that he believed plaintiff was not being promoted because Mr. Habkirk did not like her (which necessarily occurred at some point before her grievance, after which she blamed Mr. Cathcart for the denial of promotions). The only explanation for not suing or complaining sooner offered by plaintiff before or at trial was that she did not know that there was a "law that you could sue under a retaliation claim." (Tr 4/15/98, pp 1355-1356). Ignorance of the law providing a remedy for a known wrong is clearly not a basis upon which the statute of limitations may be judicially ignored.

As evidenced by her grievance in 1987, plaintiff believed that the denial of her promotions were wrongful and for reasons other than her lack of qualifications years

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before this suit was filed. Plaintiff knew immediately of the "harassment" of her by Mr. Cathcart, which she claimed was due to her grievance against him. Each of the complained of denials of promotion was a discrete decision, the results of which were immediately known to plaintiff. Contrary to the Court of Appeals' conclusion here, the denials were not similar in type; they were with regard to a plethora of different positions, with different duties.

In Jones v Merchant's National Bank and Trust Co, 43 F3d 1054 (CA 7, 1994), the Court applied the permanence or discovery rule analysis to hold the continuing violation theory inapplicable to a claim of discrimination, very much like the retaliation theories here, involving the denial of eight specific promotions which had been applied for over a seven-year period. In Jones, the plaintiff was denied promotions to: Tax Accountant Coordinator in 1983; Tax Officer in 1986; Senior Cost Analyst in 1986; Assistant Tax Officer in 1987; Senior Corporate Accountant in 1988; Senior Bank Accountant in 1988; General Ledger Report Writer in 1988; and an officer position in 1989. Only the last was within the limitations period.

The Court held that the continuing violations doctrine did not apply to save the claim as to earlier denials of promotion because each was a discrete decision, and each time plaintiff knew or should have known that she had not received the promotion and another person had. Jones, 1058. The Court reasoned:

> [A] plaintiff can show a continuing violation where an employer covertly follows a practice of discrimination over a period of time. Id. In such a case, the plaintiff can only realize that she is a victim of discrimination after a series of discrete acts that has occurred. The limitations period begins to run when the plaintiff gains such insight. [Citation omitted.] However, if plaintiff knew, or "with the exercise of reasonable diligence would have known after each act that it was discriminatory and had harmed" her, she must sue over that act within the relevant statute of limitations. Id. at 282. Here, Jones admits that she felt, at the time that

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> they occurred, that some of [the employer's] refusals to promote here were discriminatory. . . . In addition each promotion was a discrete decision and each time Jones knew, or should have known, that she had not received the promotion and another person had. . . . Thus, Jones cannot rely on any continuing violation theory to revive her claims for discriminatory promotions. [Jones, 1058.]

As in Jones, here each denial of 14 promotions was a discrete decision. Each time plaintiff knew that she had not received the promotion for which she had applied, and that another person she claimed to be less or equally qualified had. Plaintiff also knew she had opposed violations of the Civil Rights Act, and that human nature gives rise to a potential for retaliation.

Although acknowledging that Jones provides support for defendant's position, the Court of Appeals here dismissed it as "a federal case" which is not "absolutely binding." (Slip opinion, p 4, n 2). Defendant submits that this analysis is not particularly well considered, inasmuch as the continuing violation doctrine is a doctrine borrowed directly from those federal courts in the first instance.

Other federal court decisions confirm that the doctrine should not apply to facts such as these. In Selan v Kiley, 969 F2d 560 (CA 7 1992), plaintiff alleged, inter alia, that she been discriminated against on the basis of her age when she had been demoted/transferred, denied privileges and had duties taken away. Specifically, plaintiff presented evidence to the court of a transfer in May 1985, removal of privileges in July 1988, and removal of responsibilities in late 1985 and October 1987. The plaintiff argued that these acts constituted a pattern of discrimination (i.e., a continuing violation). Selan, supra, 567. In determining that the plaintiff did fall within the continuing violation doctrine, the court in Selan stated as follows:

> [T]he question is whether, in response to the defendants' motion for summary judgment, Ms. Selan produced sufficient evidence to establish

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> that there existed a genuine issue of fact whether the defendants' acts were "related closely enough to constitute a continuing violation" or were "merely discrete, isolated, and completed acts which must be regarded as individual violations." The Fifth Circuit [in Berry v LSU Board of Supervisors, supra] has suggested three factors to consider in making this determination:
>
> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a bi-weekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? [Selan, supra, 565, citations omitted, emphasis added.]

Based on the foregoing, the court in Selan found that the first Berry factor weighed in favor of finding a continuing violation as all four acts allegedly stemmed from age and/or race discrimination. However, because the alleged acts occurred over a period of almost two years, the court found that this considerable separation negated any contention that the acts were continuous or connected and weighed heavily against finding a continuing violation. Additionally, the types of acts complained of were "precisely the type of major, permanent change in employment status that should trigger an employee's awareness of the need to assert--or lose--his rights." Selan, supra, 567. The court found that the district court was correct to grant defendant's partial summary judgment because the claims were time barred.

The facts in Selan are analogous to the instant action. In this case, plaintiff is alleging retaliation about jobs for which she applied since at least 1983 and over the course of at least 14 years. This gap certainly negates any contention that the acts were "continuous or connected." Also, the fact that Sharda Garg knew, with each denial of a promotion, that she had allegedly been discriminated or retaliated against and

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harmed by the denial establishes that the time-barred acts were of the degree of permanence that should have triggered plaintiff's awareness that her rights were violated. In fact, plaintiff filed a grievance alleging that she had not received promotions as a result of discrimination based on, among other things, national origin and color.

In Bell v Chesapeake and Ohio Railway Company, 929 F2d 220, 223 (CA 6 1991), the Sixth Circuit Court of Appeals applied the Sumner/Berry "permanence rule, or the discovery rule" to hold a claim for harassment over a nine-year period to be barred. The Court held that each act of racial harassment which had occurred over that nine-year period "should have made [plaintiff] aware that he had suffered an injury, thereby imposing on him the duty to bring his action within the limitations period." Bell, 225. See also Conlin v Blanchard, 890 F2d 811 (CA 6, 1989) (since plaintiffs were certainly aware of the discriminatory acts at the time of their promotion denials, the continuing violation theory did not apply).

Similarly, in Rasheed v Chrysler Motors, 196 Mich App 196 (1982), rev'd on other grounds, 445 Mich 109 (1994), the Michigan Court of Appeals held that the continuing violation doctrine did not apply to a situation where plaintiff had made past reports of discriminatory acts and treatment to supervisory personnel. The Court found that this was proof that plaintiff was aware of the injuries caused by the acts of discrimination that had occurred prior to his discharge. The Court stated that plaintiff's failure to pursue those claims prohibited him from trying to seek damages for alleged discriminatory acts that occurred outside the three-year period of limitations.

Clearly, in the instant action, there is uncontroverted proof that plaintiff believed that she was improperly being denied promotions. Plaintiff claimed she believed she was being retaliated agaomst by Mr. Habkirk since "day one." In 1987, plaintiff filed a

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union grievance in June 1987, specifically alleging that she had been discriminated against and denied promotions. Under these circumstances, Sumner not have been expanded to negate the plain language of the three year statute of limitations as to claimed acts of retaliation and injuries occurring more that three years before suit was filed.

A new trial is required for the submission to the jury of alleged acts of retaliation more than three years before this suit was filed.

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RELIEF REQUESTED

WHEREFORE defendant Macomb County Community Mental Health Services, respectfully requests that this Honorable Court peremptorily reverse the judgments below, or grant leave to appeal, and:

Direct the entry of judgment of no cause of action in favor of defendant.

In the alternative, and if the Court determines that there was sufficient evidence to support one of the two retaliation theories, defendant seeks a new trial as to that theory only. Defendant further requests that the Court direct that summary dismissal be granted as to claims based on acts more than three years before this suit was filed, as barred by the statute of limitations.

Respectfully submitted,

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By: _____

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DATED: APRIL 18, 2002

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STATE OF MICHIGAN

IN THE SUPREME COURT

SHARDA GARG,

Plaintiff-Appellee,

V

MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, a governmental agency of MACOMB COUNTY,

Defendant-Appellant.
_____/

Supreme Court No:

Court of Appeals No.: 223829

Macomb County Circuit Court No.: 95-3319 CK

NOTICE OF FILING SUPREME COURT APPLICATION

TO: Clerk of the Court
Macomb County Circuit Court
40 North Gratiot
Mt. Clemens, MI 48043

Clerk of the Court
Michigan Court of Appeals
Cadillac Place
3020 West Grand Boulevard, Suite 14-300
Detroit, MI 48202

PLEASE BE ADVISED that an Application for Leave to Appeal by Defendant Macomb County Community Mental Health Services has been filed with the Michigan Supreme Court.

Respectfully submitted,

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI

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STATE OF MICHIGAN

IN THE SUPREME COURT

SHARDA GARG,

Plaintiff-Appellee,

V

MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, a governmental agency of MACOMB COUNTY,

Defendant-Appellant.
_____/

Supreme Court No:

Court of Appeals No.: 223829

Macomb County Circuit Court No.: 95-3319 CK

NOTICE OF HEARING

TO:

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(248) 548-1588

ALLYN CAROL RAVITZ (P19256)
Attorney for Plaintiff
30300 Northwestern Highway
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PLEASE BE ADVISED that the attached application for leave to appeal will be brought on for hearing before the Supreme Court on May 7, 2002.

Respectfully submitted,

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI

By: _____
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DATED: APRIL 18, 2002

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STATE OF MICHIGAN

IN THE SUPREME COURT

SHARDA GARG, Plaintiff-Appellee, V MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, a governmental agency of MACOMB COUNTY, Defendant-Appellant. _____/	Supreme Court No: Court of Appeals No.: 223829 Macomb County Circuit Court No.: 95-3319 CK

AFFIDAVIT OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

LYNN A. LASHER, being first duly sworn, deposes and says that she is employed by the law firm of KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI, and that on the 18th day of APRIL, 2002, she did serve upon:

MONICA FARRIS LINKNER (P28147) Attorney for Plaintiff 2000 Town Center Suite 900 Southfield, MI 488075 (248) 355-0300	ALLYN CAROL RAVITZ (P19256) Attorney for Plaintiff PO Box 948 Wolverine Lake, MI 48390-0948 (248) 960-0800

the following documents:

APPLICATION FOR LEAVE TO APPEAL BY MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES

NOTICE OF FILING SUPREME COURT APPLICATION

NOTICE OF HEARING

EXHIBITS (BOUND SEPARATELY)

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AFFIDAVIT OF SERVICE

and NOTICE OF FILING SUPREME COURT APPLICATION and AFFIDAVIT OF SERVICE only upon:

Clerk of the Court
Macomb County Circuit Court
40 North Gratiot
Mt. Clemens, MI 48043
(w/fee)

Clerk of the Court
Michigan Court of Appeals
Cadillac Place
3020 West Grand Boulevard, Suite 14-300
Detroit, MI 48202

by having same enclosed in an envelope with postage thereon fully prepaid and deposited in a United States postal receptacle.

Further affiant saith not.

LYNN A. LASHER

Subscribed and sworn to before me
this 18th day of APRIL, 2002

Meredith Roggeman

NOTARY PUBLIC, Macomb/Wayne COUNTY, MI
MY COMMISSION EXPIRES: 9/7/02

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